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April 12, 1999

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Honorable Magalie R. Salas  
Office of the Secretary  
Federal Communications Commission  
445 - 12<sup>th</sup> Street, S.W., TW-A325  
Washington, D.C. 20554

**Re: Comments Of Intermedia Communications Inc., CC Docket No. 99-68**

Dear Ms. Salas:

Please find enclosed an original and 4 copies of Intermedia Communications Inc.'s Comments in the above-referenced docket. Please date stamp the extra copy and return it in the enclosed, self-addressed stamped envelope. If you have any questions, please contact the undersigned

Sincerely,



Ross A. Buntrock

Enclosure

cc: International Transcription Services (ITS) (diskette version)  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Inter-Carrier Compensation ) CC Docket No. 99-68  
For ISP-Bound Traffic )

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**COMMENTS OF INTERMEDIA COMMUNICATIONS INC.  
SUPPORTING THE COMMISSION'S TENTATIVE CONCLUSIONS**

Intermedia Communications Inc. ("Intermedia"), by its undersigned counsel and pursuant to the Commission's Notice of Proposed Rulemaking<sup>1</sup> hereby submits its Comments in support of the Commission's Tentative Conclusions regarding the regulatory processes that should govern the establishment of rates for the transport and termination of dial-up traffic to Internet Service Providers ("ISPs"). As discussed below, Intermedia supports the Commission's tentative conclusion and recommended decision that reciprocal compensation rates for ISP-bound traffic should continue to be set in the future as they have in the past – through negotiations between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"), or in the absence of a negotiated agreement, by arbitration before the appropriate State regulatory commission. In order for such a regulatory structure to yield reasonable rates that will adequately compensate the carriers, however, the Commission must clarify that such traffic is fully subject to the requirements of §§ 251-252 of the Communications Act. Finally, in order to promote efficient use of the public switched telephone network ("PSTN"), the Commission should continue to implement rules and policies that will

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<sup>1</sup> *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 99-38, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM").

promote the migration of dial-up traffic to ISPs to dedicated circuits that bypass the PSTN.

**I. ISP-BOUND TRAFFIC MUST CONTINUE TO BE TREATED AS LOCAL TRAFFIC FOR PURPOSES OF RATESETTING, NEGOTIATIONS AND ARBITRATIONS**

Intermedia agrees with the Commissions' tentative conclusion that "our rule should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts."<sup>2</sup> As a practical matter, however, the Commission must realize that CLECs generally have absolutely no leverage in negotiating with ILECs – indeed, virtually all rates, and most terms and conditions in existing interconnection agreements, have been set by state regulators in the arbitration process mandated by § 252 of the Communications Act.

In fact, the only source of leverage that CLECs possess in negotiating with ILECs is their demonstrated ability to generate large volumes of ISP-bound terminating traffic. If, as the Commission has proposed, ISP-bound traffic continues to be treated as local traffic for negotiating or arbitrating reciprocal compensation rates, ILECs will have the strongest possible incentive to set the rates for the transport and termination of local traffic at levels that approach economic cost. Conversely, if ISP-bound traffic is eliminated from the mix of local traffic, ILECs will in many instances be net recipients of reciprocal compensation payments, and will have every incentive to set reciprocal compensation rates at the highest levels possible. Experience over the last two years dramatically demonstrates this fact – the first set of interconnection agreements were arbitrated before ISP-bound traffic became an issue, and ILECs argued that they required

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<sup>2</sup> NPRM at ¶ 29.

rates in excess of 1¢ per minute. In arbitration negotiations and arbitrations conducted in 1998 – after CLECs obtained the negotiating leverage associated with terminating ISP-bound traffic – several ILECs changed their position and promoted reciprocal compensation rates closer to .3¢ per minute.

**II. TO ENSURE THAT THE NEGOTIATION PROCESS YIELDS REASONABLE RATES FOR ISP-BOUND TRAFFIC, THE COMMISSION SHOULD CLARIFY THAT THE MANDATES OF §§ 251 AND 252 OF THE COMMUNICATIONS ACT FULLY APPLY**

In adopting the tentative conclusion that rates for ISP-bound traffic continue to be set via the negotiation/arbitration process, the Commission should take several actions to ensure that such processes will yield the results mandated by the Communications Act.

Intermedia discusses these steps below.

**A. The Same TELRIC Cost Standards that Apply to Compensation for Local Traffic Must Apply to ISP-Bound Traffic**

First, the Commission should state unequivocally that the rates that apply for the transport and termination of ISP-bound dial-up traffic must be identical to the rates established for the transport and termination of local traffic, and reflecting the same TELRIC costing methodology that the Commission has prescribed for such rates.<sup>3</sup> As discussed above, such action is necessary to provide CLECs with the negotiating leverage they require to bring market forces to bear in driving reciprocal compensation rates to

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<sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 678-698. (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) (“*CompTel*”), *aff’d in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) (“*Iowa Util. Bd.*”), *aff’d in part and reversed in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

cost-based levels. In addition, this action is necessary to forestall unnecessary litigation before State regulators. For example, Bell Atlantic recently filed petitions before the New York<sup>4</sup> and Maryland<sup>5</sup> commissions, asking them to establish separate rates for ISP-bound traffic. Of course, these State filings raise exactly the same issues being considered by the Commission in this proceeding. Bell Atlantic's State filings merely invite the State commissions to expend time and effort in considering compensation mechanisms that may ultimately be rendered moot by the decision that the Commission will make at the conclusion of the instant proceeding. The Bell Atlantic petitions represent harassing litigation that needlessly drains the resources of State regulatory commissions and competitive carriers. The Commission can help to forestall such pointless litigation by clarifying the pricing and costing rules that will govern ISP-bound traffic.

**B. CLECs Must Be Able to Invoke § 251(i) In Order to Prevent Unreasonable Discrimination**

In order to ensure that negotiations between individual CLECs and ILECs do not result in unreasonably discriminatory reciprocal compensation arrangements, the Commission should clarify that CLECs may exercise their right under § 251(i) to opt in to rates established through negotiations, or arbitrations. The Supreme Court recently

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<sup>4</sup> See *Petition of Bell Atlantic-New York to Re-Open Case 97-C-1275*, New York Public Service Commission (Mar. 2, 1999) ("*March 2 Petition*"); *Bell Atlantic-New York's Comments on Costs and Rate Structures Applicable to Large-Volume Call Termination to Single Customers* (Mar. 15, 1999)

<sup>5</sup> See *Petition of Bell Atlantic-Maryland for Declaratory Order That Internet Traffic Is Not Local Traffic Subject to Reciprocal Compensation*, Maryland Public Service Commission Case 8731 (Mar. 3, 1999).

upheld the validity of the Commission's "pick and choose" rules,<sup>6</sup> which remain the most effective means of preventing unreasonable discrimination in interconnection agreements.

**C. The Commission's Complaint, "Rocket Docket" and "Rapid Response" Processes Must Remain Available as Methods of Resolving Disputes**

In exercising jurisdiction over ISP-bound dial-up traffic, the Commission makes clear that it can hear complaints regarding compensation for such traffic pursuant to § 208 of the Communications Act. While it is unlikely that rates established through the negotiation and arbitration processes will need to be reviewed by the Commission, the § 208 process is an important backstop to ensure that reasonable outcomes obtain uniformly throughout the country.

**D. The Commission Should Reiterate Its Previous Finding that Existing Interconnection Agreements, and the State Regulatory Decisions Enforcing Them, Will Remain In Effect**

In its Declaratory Ruling accompanying the NPRM, the Commission made it clear that its finding on the jurisdictional nature of dial-up calls to ISPs did not invalidate existing interconnection agreements or the State commission decisions enforcing payment of reciprocal compensation for ISP-bound traffic.<sup>7</sup> As the Commission is aware, ILECs have nevertheless attempted to use that decision as an excuse to initiate new litigation before the State regulators. To date, such attempts have all been rebuffed by the States, which have, without exception, reaffirmed their prior orders directing payment

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<sup>6</sup> *AT&T Corp. v. Iowa Util. Bd.*, 119 S.Ct. 721 (1999).

<sup>7</sup> *NPRM* at ¶¶ 21, 25.

of reciprocal compensation.<sup>8</sup> In order to foreclose the opportunity for the ILECs to use any further Commission decisions as an excuse to engage in meritless and harassing litigation, the Commission should make clear that any new rules it adopts in this proceeding will not disrupt existing interconnection agreements or State regulatory decisions.

**III. TO ENSURE EFFICIENT USE OF ILEC AND CLEC NETWORKS, THE COMMISSION MUST ADOPT AND ENFORCE RULES AND POLICIES PROMOTING BROADBAND LOOPS**

A number of ILECs have attempted to justify their calls for disparate treatment of ISP-bound traffic by arguing that such traffic is different from “normal” telephone traffic in that it often involves long hang-times, and is predominantly one-way. Of course, these ILECs fail to explain how long hang-times associated with calls to ISPs are different from long hang times associated with calls to airline reservation systems, “chat” lines, computer help desks, catalog shopping departments, and similar service-oriented calls. The ILECs also ignore the fact that they benefit from terminating cellular traffic, which is often 75% or more one-way, terminating on the ILEC networks. They also ignore the

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<sup>8</sup> See *In Re Petition of PAC West Telecomm, Inc. for Arbitration Pursuant to Sec. 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell*, Nevada Public Utilities Commission, Docket No. 98-10015, Order Adopting Revised Arbitration Decision (April 8, 1999); *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc. and GTE Northwest Incorporated*, Washington Utilities and Transportation Commission, Docket No. UT-980370 (Mar. 22, 1999); *In the Matter of Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996*, Oregon Public Utility Commission, Order No. 99-218 (Mar. 17, 1999); *In the Matter of the Petition of Global NAPS South, Inc. for the Arbitration of Unresolved Issues From the Interconnection Negotiations With Bell Atlantic-Delaware, Inc.*, Delaware Public Service Commission, PSC Docket No. 98-540 (Mar. 9, 1999); *In Re: Emergency Petitions of ICG Telecom*

economic benefit they have received from explosive growth in second lines purchased by customers for Internet access.

Nevertheless, there is action that the Commission can take to ease any congestion that the public switched network may be realizing as a result of dial-up calls to ISPs. Specifically, the Commission can establish rules and policies – and enforce the rules and policies it has already adopted – to promote the deployment of broadband loop technologies. The deployment of such technologies will enable customers to retire their low-speed dial-up modems and switch to the high speed, “always on” Internet connections that are now available through Digital Subscriber Line and other cutting-edge technologies. These technologies all employ data solutions, and divert Internet-bound traffic away from the PSTN and onto the data networks that are now deployed by CLECs and ILECs. This is the ultimate solution to congestion – complete bypass of the PSTN for ISP-bound traffic.

The Commission will soon be initiating a proceeding that will provide it with the vehicle for adopting the rules and policies needed to optimize this conversion to broadband data loops. Pursuant to the Supreme Court’s directive, the Commission will soon initiate a new proceeding to review Unbundled Network Elements in accordance with the “necessary and impair” test mandated by the Communications Act. Intermedia urges the Commission to act expeditiously in using this proceeding to adopt rules that will:

- Confirm that ILECs must make broadband loops and transport as UNEs
- Ensure CLEC access to information regarding DSL-capable loops

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*Group Inc. and ITC DeltaCom Communications, Inc. for Declaratory Ruling,*  
Alabama Public Service Commission, Docket No. 26619 (Mar. 4, 1999).



- Require the provision of combinations of broadband UNEs, such as the “enhanced extended link” or “EEL”
- Mandate that xDSL-based services offered by ILECs are fully subject to the resale provisions of § 251(c)

Such action will ensure efficient use of both the PSTN and data networks, while promoting an optimally competitive environment for advanced services.

#### IV. CONCLUSION

For the reasons set forth above, Intermedia respectfully requests that the Commission adopt final rules governing the establishment of rates for reciprocal compensation for ISP-bound traffic, consistent with the discussion herein.

Respectfully submitted,

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